No. 15048.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FORREST SILVA TUCKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

I.
JURISDICTIONAL STATEMENT.

The appellant, Forrest Silva Tucker, was convicted by a jury on July 23, 1953, on a one-count indictment returned by the Grand Jury for the Southern District of California, which charged a violation of Title 18, United States Code, Section 2113(d), robbery of a national bank with the use of a dangerous weapon. On August 3, 1953, appellant was sentenced [Tr. 9][1] to the custody of the Attorney General for five years, to commence upon the expiration of a 25 year term imposed in the Northern District of California on May 20, 1953 on a conviction under Section 2113 of Title 18, United States

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[1]"Tr." refers to Transcript of Record.

Code, for another national bank robbery in that district [Tr. 29]. The latter conviction having been affirmed on appeal by this Honorable Court in *Tucker v. United States,* 213 F. 2d 784, appellant has been and now is confined at Alcatraz, California, on said sentence and has not commenced serving the five year term imposed in the Southern District of California.

On or about October 28, 1954, appellant filed a "Motion in the Nature of a Writ of Error Coram Nobis" in the United States District Court for the Southern District of California [Tr. 30]. An opposition to the motion was filed by the Government on December 14, 1954 [Tr. 46] and subsequently, on or about January 3, 1955, appellant filed a reply thereto [Tr. 59]. On November 10, 1955, the District Court filed an order denying the motion [Tr. 55]. It appears under the authority of *United States v. Morgan,* 346 U. S. 502, that the United States District Court has jurisdiction to consider a motion in the nature of a writ of error *coram nobis.*

A notice of appeal was filed in this Court on December 12, 1955 [Tr. 58] and appears to have been timely filed under the authority of *United States v. Hayman,* 342 U. S. 205, 209, *United States v. Scarlata,* 214 F. 2d 807, and *United States v. Morgan,* 346 U. S. 502, 506. Thereafter a designation of record [Tr. 56] and statement of points [Tr. 57] were filed by appellant in the District Court. A supplemental designation was also filed by the United States [Tr. 61]. Identical designations and a statement of points were also filed in this Court and the matter is to be heard on the original Transcript of Record without copies thereof being made.

This Court has jurisdiction under the provisions of Title 28, United States Code, Section 1291.

II.
STATEMENT OF THE CASE.

This Court's indulgence is requested with respect to the portions of the record referred to herein. Since appellee does not have a copy of the Transcript of Record and is, therefore, unable to set forth the exact pages thereof, references will be made to the beginning pages shown on the "Transcript of Record" attached to the District Court clerk's certificate, executed on February 14, 1955. Such references will be made on the assumption that the pages of the Transcript of Record before this Honorable Court will be the same as on the above documents. Further indications of pages will be made from the copies of pleadings in the record which are now in the Government's possession.

At the time of the above trial, appellant and co-defendant Richard Bernard Bellew were both represented by court appointed counsel, Richard L. Sullivan for defendant Bellew and Vincent Erickson and Hugh R. Gallagher for appellant. Both defendants were convicted by a jury, Bellew receiving a 15 year sentence and the appellant, five years.

As set forth above, the defendant Tucker had already been sentenced by the District Court in the Northern District of California for a term of 25 years on a similar charge which he is now serving in Alcatraz. It will also be seen from his "Motion for Modification of Sentence" filed in the District Court for the Southern District of California on May 27, 1954 that the appellant is under the following sentences alleged by him to be consecutive to each other:

> *"25 (twenty-five) years* imposed May 20, 1953 United States District Court, in San Francisco.

"*5 (five) years* imposed August 3, 1953 by this Court.

"*Six-five years to life consecutive* sentences imposed by the Superior Court of the State of California, County of Alameda to start after the Federal sentences which total 30 years have been served.

"*5 (five) years* in the State of Florida to be served after the California sentence is completed." [Tr. 14; p. 2, lines 15-21 of motion for modification.]

After the above motion for modification was denied by Judge David Ling, who had presided at the trial [Tr. 29], appellant filed a Motion to Vacate the Sentence on July 6, 1954, under Section 2255 of Title 28. This motion was also denied by Judge Ling [Tr. 39] on the authority of *Oughten v. United States,* 215 F. 2d 578. As stated in the opening brief, even if the motion had been sustained he would not have been eligible for release and under the *Oughten* case the proceeding was premature.

Subsequently, on or about October 28, 1954, appellant filed the Motion in the Nature of a Writ of Error *Coram Nobis* on practically the identical grounds set forth in his Motion to Vacate. It was denied by Judge Ling without a hearing by order dated November 10, 1955 [Tr. 55].

III.
ARGUMENT.

The motion in the nature of a writ of *coram nobis* was filed in the District Court below upon the following grounds which are set forth in substance:

(1) Counsel for appellant had a conflict of interest at the time of trial in that (a) he acted in concert with the attorney for the co-defendant Bellew and (b) he had previously acted as attorney in a civil matter for the government's witness John Hancock without revealing this fact to the appellant or court.

(2) Misconduct of the Assistant United States Attorney who tried the case in that through threats and promises he coerced appellant into an agreement which deprived him of a fair and impartial trial.

(3) That appellant's attorney, Hugh Gallagher, was "hostile" to the appellant and "failed to safeguard the petitioner's right to a fair and impartial trial."

(4) Two United States Deputy Marshals were present in the grand jury room at the time of the hearing of evidence and deliberation on the indictment involved which resulted in the indictment being "tainted."

(5) That the appellant was innocent of the charges contained in the indictment.

As stated above, the motion was denied without a hearing by Judge Ling who had presided at the trial of the criminal case. The Government had filed an opposition to the motion together with affidavits from the persons concerned in the factual allegations made by appellant.

(a) Issues.

It appears that the record on appeal from the order of denial of the Motion in the Nature of a Writ of Error Coram Nobis raises the following issues:

(1) Whether or not the District Court is required to conduct a hearing on the motion;

(2) If so, whether or not this Honorable Court may make a determination on appeal from the present record as to whether or not appellant's presence at such hearing would be necessary;

(3) Whether or not the case should be remanded for a certification from the District Court that the files and records of the case conclusively show that the appellant was entitled to no relief;

(4) Whether or not the case should be remanded for formal findings of fact and conclusions of law in connection with the order denying the motion.

(b) Did the District Court Properly Deny the Motion in the Nature of a Writ of Error Coram Nobis Without a Hearing?

The Supreme Court of the United States in case of *United States v. Morgan,* 346 U. S. 502 decided January 4, 1954, termed the writ of error *coram nobis* an "extraordinary" remedy. It is apparent that a hearing is necessary upon application for this extraordinary writ under certain conditions.

In *United States v. Hayman,* 342 U. S. 205, decided January 7, 1952, the Supreme Court held at page 220:

> "We conclude that the district court did not proceed in conformity with section 2255 when it made

> findings on controverted issues of fact relating to respondent's own knowledge without notice to respondent and without his being present."

At page 222 of the *Hayman* opinion, footnote 36, the Court stated:

> "Further, it by no means follows that an issue of fact could be determined in a *coram nobis* proceeding without the presence of the prisoner, the New York Court of Appeals recently holding that his presence was required under the common law. . . ."

The express language of Section 2255, Title 28, U. S. C., provides that the court may determine such a motion without requiring the production of the prisoner at the hearing and the Supreme Court stated that under that section he would not be automatically produced in every such proceeding. It is clear that the same principle applies when the matter is brought before the Court by a motion in the nature of a writ of error *coram nobis* rather than under Section 2255.

Although a hearing is necessary in certain instances, the Government respectfully submits that the within matter does not fall in that category of cases.

It is fundamental that a judgment carries with it the presumption of regularity and is not lightly to be set aside. The burden is on the accused to show that it is not correct.

> *United States v. Morgan,* 346 U. S. 502, *supra;*
>
> *Haywood v. United States,* 127 Fed. Supp. 485 (Dec. 29, 1954).

Since we are dealing here with an "extraordinary" remedy and also with a judgment which is presumed to

be regular, it is submitted that the appellant had the burden on his motion before the District Court of strict compliance with the conditions set forth by the following authorities.

First, the errors of fact which are alleged to have occurred must be set forth in detail.

In the case of *United States v. Pisciotta,* 199 F. 2d 603 (7th Cir.), decided November 3, 1952, the Court of Appeals in discussing the insufficiency of the moving papers stated that the appellant should have alleged certain circumstances in detail. The Court went on to say that since it would result merely in delay to affirm the order because of the insufficiency of the moving papers it would be consequently remanded in order that the appellant would have the opportunity of filing a supplemental affidavit to cure, if he could, the defects of his pleadings.

Although that case was concerned primarily with whether or not the prisoner should have been produced for a hearing, it is submitted that in order to invoke a hearing at all the facts should be fully alleged.

In *United States v. Sturm,* 180 F. 2d 413 (7th Cir.), it was held that an application for a writ of error *coram nobis* must contain allegations of the facts in detail as distinguished from mere conclusions. It was further stated that insufficiency of the pleadings can require a denial of the application.

The Court of Appeals for the Seventh Circuit on February 27, 1948 stated in *United States v. Moore:*

> "As a corollary, it is not sufficient to aver merely, in general terms, that the defendant has a good and meritorious defense but the nature of that defense,

> the facts constituting it, must be set forth in such detail as to enable the court to determine whether it is meritorious and sufficient."

The Court in the *Moore* case, *supra,* went on to say that the above rule applies irrespective of how the judgment is attacked and applies in applications for writs of *coram nobis.* This followed from the historical fact that the writ at common law was used to bring before a court a judgment rendered by it for the purpose of review because of an error in fact affecting the regularity of the proceedings. The Court then quoted with approval from *Shipley v. State,* 210 Ind. 253, 2 N. E. 2d 389, to the effect that before the writ would be granted it must be clearly apparent that a valid defense exists in the facts of the case for the petitioner.

In *Adams v. United States,* 222 F. 2d 45, the Court of Appeals for the District of Columbia discussed the appellant's allegations as to an absent witness at the time of trial. Apparently he had not set forth what the substance of the testimony of this witness would have been, asserting merely that it would have established innocence. The Court said that on the face of the record his allegations would not sustain his claim that he was not given a fair trial and that his sentence should be set aside.

The Court in the *Adams* case went on to quote with approval from *Diggs v. Welch,* 148 F. 2d 667, in which it was stated that in order for a claim under Section 2255 to succeed an "extreme case" must be disclosed. It must be *shown* that the proceedings were a farce and a mockery of justice. . . . (Emphasis added.)

It is submitted that an extreme case must be disclosed not only at the time of the hearing, but on the face of the pleadings themselves.

In the case of *United States v. Newman,* 126 Fed. Supp. 94 at page 97, the Court stated that in determining whether substantial issues are raised the Court must determine whether the facts alleged have or do not have any merit.

> "Where the allegations are *patently unbelievable* from a study of the motions, files and records of the case, the court in the exercise of sound judicial discretion should deny relief, otherwise the court would be required on bare allegations to transfer prisoners at their whim." (Emphasis added.)

Also in *Johnson v. United States,* 163 F. 2d 827 (5th Cir.), the Court stated briefly:

> "An examination of the contents of the petition in the *light of the record* discloses no ground for the granting of the *extraordinary* writ he wishes and the petition is denied." (Emphasis added.)

It must be kept in mind in the within case that Judge Ling who denied the Motion in the Nature of a Writ of Error Coram Nobis presided over the trial of the criminal case. There is no indication that he did not have access to the reporter's notes of the proceedings and, of course, he was able to review the record which is before this Honorable Court. In addition, Judge Ling had the benefit of his knowledge of the trial proceedings, a transcript of which is not before this Honorable Court. It will be shown by a review of this point raised in the motion before him that the allegations in the pleadings alone were

patently unbelievable or that the bare allegations were completely insufficient to warrant a hearing.

In *Morales v. United States,* 187 F. 2d 518, the Court of Appeals for the First Circuit on March 14, 1951 reviewed a denial of a motion under Section 2255. At page 519 the Court stated:

> "*It is apparent* that the district court decided the appellant's motion on its face in the light of the files and records of the case, and on that basis determined that it conclusively appeared that the petitioner was entitled to no relief. There was, therefore, no statutory requirement for making findings of fact and conclusions of law, for *summary disposition of futile motions* is permitted under the third paragraph of section 2255. . . ." (Emphasis added.)

It is respectfully submitted that this Court will be able to state from a review of the record that it is likewise apparent the Court decided the motion below in a similar manner and that the denial of the motion without a hearing was completely warranted.

1. Alleged Conflict of Interest of Attorney for Appellant.

In his Motion in the Nature of a Writ of Error Coram Nobis appellant alleged that Mr. Gallagher had represented the government's principal witness in a civil matter *prior to the time of the criminal trial.* It was further stated that appellant had not been advised of Mr. Gallagher's "connection" with said witness. It was also alleged that at appellant's insistence counsel finally agreed to visit the bank where the witness was employed but that the effort was not "fruitful." As a result of this situation it was alleged that Mr. Gallagher gave his allegiance to the witness, did not act in good faith and that his ques-

tioning of the latter was a "farce and a mockery," being a show "put on for the benefit of the Court and the petitioner."

In connection with the alleged conflict of interests appellant stated that Mr. Gallagher advised him that no defense was needed for petitioner and that he had agreed with counsel for the co-defendant to conduct the defense of the petitioner "with due regard to the defense of Mr. Sullivan's client." It was said at page 4 of appellant's motion "Throughout the entire trial Mr. Gallagher's attitude was that the petitioner would automatically be acquitted and even if he were convicted the Government would not impose an additional sentence. His theory of a defense was to aid the defense of the co-defendant."

As stated in appellant's motion this contention was related to his Point Three on page 8 of said motion [Tr. 30]. Rather than making a separate subtitle for the latter it will be discussed herein. Appellant claimed that Mr. Gallagher was "hostile" to the petitioner and failed to safeguard his right to a fair trial. It was alleged that his attorney "expressed his disfavor" at the appointment, that he was being "forced" to represent him by the Court, that throughout the trial when petitioner demanded certain objections be made, Mr. Gallagher told him to "sit tight" and that since part of his living was made in federal courts he did not want to jeopardize his position in a case for which he was not being paid.

In support of his allegation that a conflict of interest existed because of counsel's alleged prior representation of the Government witness in a civil action, appellant cited the case of *United States v. Hayman,* 342 U. S. 205. There, the defendant had received a 20-year sen-

tence on a Federal charge and filed a motion under Section 2255 alleging that he had not had effective assistance of counsel. The claim in that case was made that a principal witness against him at his trial, who was a defendant in a related case, was represented by the same lawyer who conducted his defense. The Court held that "since a conflict of interests of his attorney might have prejudiced respondent *under these circumstances* * * *" (emphasis added) a hearing was warranted.

It is submitted that the situation in the *Hayman* case was entirely different from the circumstances which were alleged herein. If appellant's attorney had represented a Government witness in a prior civil proceeding *before the trial,* it would not *per se* create a conflict of interests in the subsequent action or even a question of conflict which would warrant a hearing. In the *Hayman* matter the attorney in effect was representing two different defendants in practically the same criminal proceeding. It is obvious that such a claim could raise issues which would entitle the defendant to a hearing under Section 2255 or *coram nobis.* Not only is the bare fact of *prior* representation in a *civil* proceeding insufficient to warrant a hearing on the matter but there is no further allegation of any details which would change that situation. Appellant in effect baldly alleged that his counsel had given his alliance to the witness and did not act in good faith. The allegation that the questioning of him by counsel was a "farce and a mockery" is not sufficient to raise an issue under the present proceeding without further detail.

The Court of Appeals for the Eighth Circuit in *Ray v. United States,* 197 F. 2d 268, discussed the record which was before it on appeal. Apparently the record of the

proceedings and testimony at the trial was filed with the District Court but no transcript was furnished to the Appellate Court. It was said:

> "The trial judge was best able to say whether the record made at the trial disclosed any grave lack of preparation or of effective representation on the part of the defendant's counsel and whether the Government secured a conviction based upon the testimony of a witness who was clearly incompetent to testify.
>
> "Upon the record furnished us, we would not be justified in ruling that the District Court was required to grant the defendant a hearing and to make Findings of Fact or Conclusions of Law. * * *"

No record of the proceedings had at the time of trial is before this Honorable Court and it is felt that the assumption can be made on appeal that Judge Ling was best able at the time the above motion was made to determine whether the representations with respect to counsel were true. This is particularly appropriate since most of the allegations made under these two points concern happenings at the time of trial.

In the case of *Adams v. United States,* 222 F. 2d 45, *supra,* the transcript of the trial proceedings was before the Appellate Court so that an examination could be made to determine if the appellant was competently defended. In the absence of such a transcript and the lack of detail in appellant's allegations there appears to be no justification for the conclusion that a hearing should have been ordered on that point.

In the case of *United States v. Malfetti,* a matter was brought before the District Court on a "Petition for Writ of Error Coram Nobis" but it was treated as an

application under Section 2255. The allegations of the petition assailed the competence of defense counsel, particularly his trial strategy. "The defendant complains that the disclosure of his criminal record early in the trial was a blunder in strategy and prejudicial to his defense * * *. The defendant complains further that he was reluctant to testify on his own behalf and that he was persuaded to do so by his defense counsel." The trial court held at page 29 of the opinion as follows:

> "We are of the opinion that the allegations of the petition, considered in the light most favorable to the defendant, will not support the grounds upon which the motion is based. Assuming, but not deciding that the defense counsel was guilty of the several errors of judgment with which he is here charged, these errors in judgment were not such as to entitle the defendant to a new trial. It is well settled that 'error in judgment, incompetency or *mismanagement* of the defense by counsel is generally not ground for a new trial.' Burton v. United States, * * * 151 F. 2d 17, 18, * * *." (Emphasis added.)

If this were a case where the appellant's extreme youth at the time of trial or on a guilty plea and lack of counsel were in issue, it would appear that a hearing would be warranted. However in this case the allegations as made would not support a requirement for a hearing and there are no details set forth to show that his representation was a "farce and mockery."

Thus, by way of recapitulation, it is respectfully submitted that a hearing was not warranted on the above contentions made by the appellant because of the authorities which have been set forth herein, the insufficiencies of the pleadings and the lack of a transcript of the record.

2. Alleged Misconduct by Assistant United States Attorney.

As will be noted on pages 5, 6, 7 and 8, appellant alleges that Mr. Manuel Real, formerly an Assistant United States Attorney in the Southern District of California, was guilty of misconduct in that through "threats and promises" he coerced the petitioner into not calling certain witnesses for his defense.

An alleged verbatim report of his conversation with Mr. Real in the United States Marshal's office on or about July 21, 1953, is set forth in the petition. It involved in substance certain witnesses who were to be called to prove that the defendant was in Bakersfield, California, on the day of the robbery. Mr. Real allegedly requested him not to call all of said witnesses since it would hurt the Government's case against co-defendant Bellew. An alleged promise was made to the appellant that the Government would recommend a concurrent sentence if a conviction were secured or perhaps the Government might even agree to an acquittal for appellant at the end of the Government's case.

Appellant alleges at page 8 of his brief [Tr. 30] "the petitioner kept his part of the bargain, he did not request the six witnesses who could testify that it would be impossible for the petitioner to be in Los Angeles on the day of the robbery * * *."

In *Pike v. State,* 139 So. 196, 103 Fla. 594, the Court held that when a writ is sought on the ground of the prosecuting attorney's suppression of evidence, the question would be whether his conduct was characterized by such dominating fraud as to affect the judgment.

However, it does not appear that this court need consider such a question.

In *United States v. Newman,* 126 Fed. Supp. 94, *supra,* the Court stated at page 97:

> "There is involved in this motion grave allegations of improprieties on the part of an Assistant United States Attorney, also on the part of a highly respected member of the bar since deceased. Standing by themselves, the charges would be sufficient to require a hearing into their truthfulness. *However, there are other circumstances appearing on the record."* (Emphasis added.)

In the above *Newman* case the Court continued to discuss certain unequivocal contentions of innocence which were somewhat contradicted in a letter filed in the Court of Appeals and also the fact that the charges against Government counsel came "late in the day." Apparently the Court felt that it was "singular" that a defendant who had previously alleged in detail as to incompetence, inefficiency, negligence and unfaithfulness of his counsel, should have failed to allege in detail the misconduct of the district attorney. The Court went on "this is therefore not a case where the allegations are meritorious on their face on a view of the entire record and files, . . . The Court concludes that *the defendant is unworthy of belief,* that no purpose would be served in bringing him before the Court to give oral testimony. The Court also finds on a study of the record that defendant raises no substantial issue as to the events alleged to have occurred, and that on the motions files and records defendant is entitled to no relief." (Emphasis added.)

Assuming that normally the allegations with respect to Mr. Real were charges sufficient to require a hearing into their truthfulness, there are, however, other circum-

stances in the record before this court which show that a hearing was not in fact required.

On the 22nd day of July, 1953, while the trial of the criminal case was still in progress an "Affidavit of Indigent Defendant Richard Bernard Bellew" was prepared for the signature of said defendant [Tr. 6]. It contained a list of seven names of witnesses without whose presence it was said the defendant could not safely go to trial. Although appellee does not have access to the original affidavit at this time, and the copy in its possession is not conformed, it will be noted that the original contains handwritten inserts of the appellant Tucker's name so that when it was filed the document was a joint affidavit of both defendants. The presence of these witnesses was requested by the defendants as eye witnesses of the events which occurred at the time of the robbery in connection with their identification as perpetrators of the crime.

In appellant's Motion in the Nature of a Writ of Error Coram Nobis below it was alleged on page 9 thereof as follows:

> "The co-defendant prepared a motion that certain witnesses be called to testify for the defense. The petitioner requested Mr. Gallagher to make a like motion but he was told those were Bellew's witnesses and he didn't want to infringe on Mr. Sullivan's case. It was necessary for the petitioner to go to Mr. Sullivan and *demand* that his name be added to the motion. Mr. Gallagher protested but Mr. Sullivan added the petitioner's name to the motion in ink. This motion was subsequently denied." (Emphasis added.)

The filing of the above affidavit and the allegations set forth in the motion with respect thereto are at considerable

variance with the appellant's contentions on Points Two, pages 5, 6, 7 and 8 of his motion [Tr. 30], with respect to alleged misconduct by the Assistant United States Attorney.

As stated above, appellant's claim was that Mr. Real asked him not to call certain witnesses for his defense "who might compromise the government's case against the co-defendant, Bellew, . . ." Those witnesses were allegedly to be used to prove that the appellant was in Bakersfield, California, the day of the robbery. It was then alleged at page 8 that the petitioner had kept his part of the bargain not requesting the witnesses who would testify to that effect. This does not sound like the same defendant who was on practically the same day insisting to his counsel that his name be added to an affidavit which requested the presence of witnesses who would surely "compromise" the government's case by indicating that the defendants could not be identified as the perpetrators of the crime. By his own statements, appellant admitted that he went to Mr. Sullivan, counsel for Bellew, and *demanded* that his name be added to the motion. Why would he insist upon this if under his alleged agreement with Mr. Real where he was expecting a favorable recommendation for a concurrent sentence or an agreement to an acquittal for him at the end of the government's case, he was not supposed to call witnesses who would hurt the government's case against Bellew.

The Government respectfully submits that on the face of the motion itself his allegations with respect to Mr. Real are "patently unbelievable."

Further light on this point is shed by another pleading in the record on appeal.

This case proceeded to trial before a jury on the 20th day of July, 1953, the Honorable Dave W. Ling presiding. It continued to July 23, 1953, when the jury retired for its deliberation. When the trial was well on its way to a conclusion the defendant Tucker submitted the following instruction [Tr. 2]:

> "When one who is not at the place where a crime was committed at the time of its commission is later charged with having been present and having committed or taken part in committing such crime, his absence from the scene of the crime, if proved, is a complete defense that we call an alibi.
>
> "The defendant, FORREST SILVA TUCKER, in this case *has introduced evidence tending to prove that he was not present at the time and place of the commission of the alleged offense,* for which he is here on trial. If, after a consideration of all the evidence, you have a reasonable doubt whether or not the defendant was present at the time the crime was committed, he is entitled to an acquittal." (Emphasis added.)

Although the defendant assured the trial court in his motion that *he had kept his part of the "bargain"* the Assistant United States Attorney did not follow through with his alleged promises. However, appellant's own instruction shows that he introduced evidence tending to prove that he was not present at the time and place of the commission of the alleged offense for which he was on trial. This cannot be reconciled with his statement that he was willing not to call witnesses who would prove that he was not in Los Angeles on the day of the robbery. Therefore, again on the very face of the record before this Court it appears that the petitioner's allegations with respect to Mr. Real are unbelievable.

3. Alleged Presence of Two Deputy Marshals During Deliberation and Voting of Grand Jury.

Again, the defendant has not set forth in any detail the facts surrounding the alleged presence of the above individuals in the grand jury during voting and deliberation on the within indictment. If the defendant actually had heard of such an occurrence and was not able to obtain such information as the names of the deputies, etc., then it is submitted that the source of his information or any other pertinent facts should be set forth in full in the motion. Then, if the point were appropriate on the motion, the district court would have had an opportunity to determine if a hearing were warranted.

However, it appears that under Rule 12(b)(2) of the Federal Rules of Criminal Procedure such an objection is waived unless raised in the manner set forth therein. It reads in part as follows:

> "Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the Court or to charge an offense may be raised only by motion *before* trial.
>
> "Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the Court for cause shown may grant relief from the waiver * * *." (Emphasis added.)

The record does not show that any objection before trial was made on this point by the appellant. Further, no cause was shown to the District Court so that relief could be granted from a waiver. It also appears that this objection might then be proper on appeal, but not appropriate to a motion in the nature of a writ of error *coram nobis*.

(c) If the Hearing Is Required, Should the Appellate Court Make a Determination at This Time as to Whether or Not Appellant's Presence Would Be Necessary?

The Government has strongly urged in subdivision (b) *supra,* that no hearing was required to support the District Court's denial of the Motion in the Nature of a Writ of Error Coram Nobis.

Assuming, *arguendo,* that this Court holds a hearing was necessary, the prison's production for such a hearing should not be ordered unless there are "substantial issues of fact as to events in which the prisoner participated." In the case of *United States v. Pisciotta, supra,* the Court of Appeals for the Second Circuit at 199 F. 2d 603, stated:

> "But in applying this sound precept the question arises how fully must a convict allege the facts upon which he relies in order to establish that the motion raises 'substantial issues of fact'. If it were sufficient to allege merely conclusionary statements, such as, 'I am innocent but was induced to plead guilty against my wishes,' one can readily imagine how many convicts without valid complaint against their sentences would obtain an excursion from a distant penitentiary at Government expense. We think that the motion papers must contain more than conclusionary allegations of innocence and of a miscarriage of justice.
>
> * * * * * * * *
>
> "Consequently we think the cause should be remanded in order that the appellant may file a supplemental affidavit to cure, if he can, the defects of his October 1951 affidavit. The Court will then be in a position to determine whether 'substantial issues of fact' are presented which require the prisoner to be brought on to testify at the hearing."

It is apparent that this case when using the words "the Court" was referring to the District Court below.

Thus, it is submitted that the only action which could or should be taken by this Court in that event would be a remand in order that appellant could cure any possible defects in his pleadings.

However it is felt that this would not be proper procedure since the allegations on the face of the motion itself contradict each other so that his contentions are patently unbelievable. It obviously appears that the "farce and mockery" of his representation consisted of alleged mismanagement of the trial by his counsel which the cases have held is clearly not a ground for a motion of this nature. The last point with respect to the Deputy Marshals in the Grand Jury is again not an appropriate basis for this motion.

(d) Was the District Court Required to Make Findings of Fact and Conclusions of Law and/or a Certification That the Files and Records of the Case Conclusively Showed That the Appellant Was Entitled to No Relief?

Appellant has contended that procedure under *coram nobis* is similar to that under Section 2255 of Title 28, United States Code. The third paragraph of that section provides that "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the Court shall * * * determine the issues and make findings of fact and conclusions of law with respect thereto." Thus, it is apparent that the Court does not have to make findings of fact and conclusions of law when the record shows conclusively that the petitioner is not entitled to relief. It is believed that it has been demonstrated that the motion and the files and records of this

case do conclusively show that the prisoner is entitled to no relief and therefore, findings of fact and conclusions of law were not necessary.

There is no indication in the *Hayman* and *Morgan* cases that the District Court must so certify and in fact in the case of *Morales v. United States, supra,* 187 F. 2d 518 at page 519, the Court of Appeals for the First Circuit stated, "*It is apparent* that the District Court decided the appellant's motion on its face in the light of the files and records of the case, and on that basis determined that it conclusively appeared that the prisoner was entitled to no relief." This definitely indicates that the Court of Appeals may scrutinize the entire record to determine on what the District Court did base its decision that the petitioner was conclusively not entitled to relief on the files and records of the case. Indirectly, it tells us that no certification to that effect is necessary. It is sufficient if it appears that such was the case.

IV.
CONCLUSION.

It is respectfully submitted that the order of the District Court denying appellant's motion in the nature of a writ of error *coram nobis* should be affirmed by this Honorable Court.

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